

In the Supreme Court of the United States

ON WRIT OF HABEAS CORPUS

No. 123

THE UNITED STATES OF AMERICA

Respondent

NATIONAL LABOR RELATIONS BOARD

Petitioner

PETITION FOR A WRIT OF HABEAS CORPUS
To the United States Circuit Court of Appeals
For the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No.

THE NILES FIRE BRICK COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Niles Fire Brick Company, the petitioner, prays that a Writ of Certiorari be issued to review the judgment and order of the United States Circuit Court of Appeals for the Sixth Circuit, entered on December 5, 1941, affirming the order of the National Labor Relations Board made on the 28th day of December, 1939.

OPINIONS BELOW.

The findings of fact, conclusions of law, and order of the National Labor Relations Board, hereinafter called "The Board," are printed on pages 36 to 114 of the Record and reported in Volume 18, No. 98 in the Official Reports of the Board. The opinion of the Circuit Court of Appeals is reported in 124 Fed. (2nd) 366.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 5, 1941, and its order was entered on December 5th, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347 (a)) and Section 10 (e) of the National Labor Relations Act (29 U. S. C. A. Section 160 (e)), and under General Rule 38 of this Court, Section 5, subdivision (b).

STATUTES INVOLVED.

The Statute involved is the National Labor Relations Act, which we shall here refer to as the "Wagner Act" or "The Act" (29 U. S. C. A. Section 151 *et seq.*). The pertinent provisions of the Act are: Section 7, Section 8 (1) (2) (3) (4) (5), Section 9 (a), (b), (c), (d), Section 10 (a), (b), (c), (e). Because of the length of these provisions we shall set them forth in an appendix.

QUESTIONS PRESENTED.

1. Where, in a dispute between employees concerning exclusive representation for purposes of collective bargaining, a proceeding was had under Section 9 (c) of the Act, can such proceeding after hearing and before decision be later consolidated with a proceeding subsequently brought against the employer under the provisions of Section 10 (b) of the Act wherein the employer is charged with unfair labor practices?

2. In the event proceedings are consolidated as stated above pursuant to Article II, Section 37 (b) of the Rules and Regulations of the Board (R. 38), can the evidence introduced in the proceeding under section 9 (c) be used by the Board to prove jurisdiction in its case against the employer in the proceeding under Section 10 (b)?

3. Where, in a proceeding under Section 10 (b) of the Act, a specific mode of procedure is provided in the Act, but the Board arbitrarily adopted a different mode of pro-

cedure over the objection of the employer, the effect of which is to permit the Board to establish jurisdiction by improper evidence and thereby shift the burden of proof so that the employer is required to disprove the jurisdiction of the Board, and where the Board then denies the employer the right to introduce evidence to disprove the jurisdiction of the Board, was the employer denied due process of law under the Fifth Amendment of the Constitution of the United States?

4. Can an employer be chargeable with an unfair labor practice in violation of the Act because a foreman has made statements to employees in opposition to one union and in favor of another union, where such statements are made without authority and in direct opposition to orders of his superior officers, and where such conduct on the part of the foreman never came to the attention of the employer's officials so as to afford an opportunity to rebuke him and disavow his authority?

5. Whether the Board's finding that petitioner dominated and interfered with the formation and administration, and contributed support to the independent union was supported by adequate evidence?

6. Whether the Board's finding that petitioner discriminated against employees listed in Appendices A, B and C, in regard to their hire and tenure and terms and conditions of employment, thereby discouraging membership in a labor organization, was supported by adequate evidence?

7. Whether the Board's finding that petitioner discriminated against Paul Yarwood because he had given testimony under the Act was supported by adequate evidence?

8. Whether the Board's finding that petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act was supported by adequate evidence?

STATEMENT.

The petitioner, The Niles Fire Brick Company, is located in Niles, Ohio in what is commonly known in industry as the Mahoning Valley District. It employs approximately 200 men (R. 159) in the manufacture of refractories commonly known as "fire brick" (R. 540). In this Mahoning Valley District are located steel plants which are its principal customers.

During the latter part of May and the first part of June, 1937, the Steel Workers' Organizing Committee (S. W. O. C.) solicited members among the employees of the petitioner's plant (R. 666, 667, 835) which organization is hereinafter referred to as the "C. I. O." and designated in the Record as the "Union" (R. 211 and 212). It was during this period that the so-called "Little Steel Strike" was in progress involving two of the principal customers of the petitioner, namely, The Youngstown Sheet & Tube Company and The Republic Steel Corporation (R. 225, 312, 313, 604, 843, 851), and strikes and labor unrest were prevalent throughout the entire valley (R. 550, 615, 666, 850). Due to these strikes and the consequent shutting down of the operations in these two plants, it became necessary to shut down the petitioner's plant indefinitely (R. 545, 604). On June 5th, 1937, the plant did close and did not reopen until June 28th, 1937 (R. 602).

Due to the fact that the management believed the plant would be closed down for an extended period and since many of the employees desired advances on their pay to enable them to return to their homes in Kentucky, it was decided to advance the payday one week in order to accommodate them (R. 345, 545 to 548, 602 to 605). When the men were paid their badges were taken up since it was uncertain how many would return when operations were resumed, and since a deposit had been made by each employee for his badge. Some employees believed that the advance in the payday and the return of the deposit on their checks indicated that they had been discharged. How-

ever, they were told by the management that this was not the case and to assure the employees of its good faith gave them a written statement to the effect that they had not been discharged but that all employees would be returned to their regular employment and given their share of the work when the plant reopened (R. 873, Bd. Ex. 2).

On July 9th, a committee purporting to represent the C. I. O. attempted to negotiate a contract with the petitioner* (R. 156, 306, 610). After several conferences no agreement was reached with the result that on July 19th the Union called a strike.

Prior to and during the strike, dissension and discord arose among members of the C. I. O. growing out of the conduct of the union affairs by the officers and the calling of the strike. The result was that most of the employees returned to work (R. 616) before the strike was officially terminated. This split in the union ranks caused the formation of a union group composed largely of union members who decided to withdraw from the union and form an independent organization (R. 169, 170, 200, 201, 311, 787 to 793, 808 to 813, 817, 818, 836, 839, 840, 854 to 856, 861). This new group of employees is hereinafter referred to as the "Independent." The strike was officially terminated on August 1 (R. 157, 616).

At the time the strike began, eight kilns loaded with bricks were being burned (R. 733). Ordinarily, it takes eleven to thirteen days to complete the burning of bricks in a kiln. The bricks in the kilns at the time of the strike had been burning only two days (R. 436). When the men went on strike they left the kilns without anyone to attend them with the result that it was necessary to seal them. When the plant resumed operations, it was necessary to reopen and unload these kilns to determine whether the bricks had been spoiled (R. 244). Operations had to start from the bottom and it was impossible to give all of the men immediate employment after the strike ended.

The plant was operated only during the day, and night turns were not started until later (R. 616, 617).

Due to the inability of the petitioner to immediately place all employees at work, the Union sought the assistance of a Mr. Reichert, a representative of the Federal Department of Labor. The petitioner entered whole-heartedly with him in an attempt to solve mutual problems. It even gave employment to those whose services were not actually needed at that time by giving them work in other departments, and as a result most of the existing issues were settled.

On September 23, 1937, the C. I. O. filed with the Regional Director of the National Labor Relations Board a petition requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act. On October 4th, the Board ordered the Regional Director to conduct an investigation and provide for an appropriate hearing. Such a hearing was held in Warren, Ohio, on November 1 and 2, 1937 (R. 36 and 37). At such hearing two of the petitioner's employees, acting on behalf of themselves and about 160 other employees, were granted leave to intervene (R. 36, 937, 938). The Board and the intervenors introduced evidence and the intervenors presented a petition opposing the election (Intervenors' Exhibit No. 4) (R. 939 to 944). The petitioner did not introduce any evidence nor participate in the hearing other than to raise a formal objection to the jurisdiction of the Board.

Within a short time after this hearing, the C. I. O. requested the Board not to conduct an election since it believed it would lose. Pursuant to such request the Board neither conducted an election, nor rendered any decision in the case. Later, on November 15th, 1937, the C. I. O. filed a charge with the Board alleging that the petitioner had been engaging in unfair labor practices (R. 202, 879).

On February 28, 1938, the Board issued its complaint based on the C. I. O. charges of November 15, 1937, alleging

that the petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) (2) (3) (4) (5) and Sec. 2 (6) (7) of the Act (R. 23 to 28). To this complaint the petitioner filed its answer denying the allegations contained therein (R. 29) and pursuant to notice a hearing was held at Niles, Ohio, commencing March 10, 1938 (R. 142).

At the commencement of the hearing on March 10th, the Board offered in evidence an order consolidating the representation case instituted by the Board on October 4, 1937 under Section 9 (c) of the Act and the instant case which was initiated by the filing of the complaint against the petitioner on February 28, 1938. This order of consolidation was presumably made on January 14, 1938, before the complaint in the instant case was issued, and the cases were consolidated without the knowledge of or notice to the petitioner. The Board then offered in evidence a transcript of the proceedings and evidence in the representation case as a part of the evidence in this case. The petitioner immediately entered its objection to the consolidation of the cases and to the introduction of the transcript of evidence offered by the Board. However, these documents were both admitted over the objection of the petitioner (R. 39, 142 *et seq.* 146, 147). The Board offered no further evidence of its jurisdiction over the affairs of the petitioner and the Trial Examiner refused to permit the petitioner to introduce any evidence on this point (R. 541 to 543).

On September 12, 1938, the Trial Examiner filed his intermediate report and on December 28, 1939 the Board issued its decision and order in which it dismissed the petition for certification issued under Section 9 (c) of the Act, and found that the petitioner had engaged in unfair labor practices as therein set forth (R. 36 to 114). On January 6, 1941 the Board filed its petition for enforcement in the United States Circuit Court of Appeals for the Sixth Cir-

cuit (R. 1) and on December 5, 1941, that Court filed its opinion and order affirming the findings and order of the Board (R. 947, 948).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

I. In not holding that petitioner was denied due process of law under the Fifth Amendment of the Constitution of the United States where, in a proceeding against petitioner under Sec. 10 of the Act, the Labor Board erroneously consolidated with it a proceeding under Sec. 9 (c) of the Act which had been previously heard but not decided, and introduced into evidence over petitioner's objections the record of the proceedings under Sec. 9 (c); and where the Board thereafter in said hearing failed to introduce any evidence on the question of jurisdiction and denied petitioner the right to introduce any evidence on the same question (R. 142 *et seq.* 146, 147).

II. In holding that an employer is guilty of an unfair labor practice in violation of the Act by reason of statements made by a foreman in opposition to one union and in favor of another union where such statements are made without authority in direct opposition to orders of superior officers and where such conduct on the part of the foreman was unknown to the employer's officials so as to afford them an opportunity to rebuke him and disavow his authority.

III. In holding that the Board's finding was supported by adequate evidence with respect to (1) the domination, interference and support of the Independent Union; (2) petitioner's discrimination against employees listed in Appendices A, B and C in regard to their hire and tenure, and terms and conditions of employment, thereby discouraging membership in a labor organization; (3) petitioner's discrimination against Paul Yarwood because he had given testimony under the Act; (4) and petitioner's

interference with and restraint and coercion of its employees in the exercise of rights guaranteed in Section 7 of the Act.

REASONS FOR GRANTING THE WRIT.

1. The Court below, in holding that a proceeding under Section 9 (c) of the Act after hearing and before decision can be consolidated with a proceeding subsequently brought against the employer under the provisions of Section 10 (b) of the Act wherein the employer is charged with unfair labor practices, has decided an important question of Federal law which has not been but should be settled by this Court.

2. The Court below, in holding that the evidence introduced in a proceeding under Section 9 (c) of the Act may be used by the Board to prove its jurisdiction in a proceeding subsequently brought against the employer under Section 10 (b) of the Act when such cases are not heard jointly, has decided an important question of federal law which has not been but should be settled by this Court.

3. The petitioner was denied due process of law under the Fifth Amendment of the Constitution of the United States by the action of the Board set forth in 1 and 2 above, since the effect of such procedure was to shift the burden of proof to the employer so as to require the employer to disprove the jurisdiction of the Board. This, combined with the fact that the Board then denied the employer the right to introduce evidence to disprove the jurisdiction of the Board, denied petitioner due process.

4. The decision of the Court below gives sanction to an arbitrary form of procedure adopted by the Board contrary to the procedure prescribed by the Act, thereby denying petitioner due process of law.

5. The decision below in upholding the findings of the Board that an employer was responsible for a foreman's ex-

pression of opposition to a union and his efforts to promote an independent union where such statements were made in direct opposition to orders of his superior officers and where such conduct never came to the attention of the employer is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *N. L. R. B. vs. Swank Products Company*, 108 Fed. (2nd) 872, and *Quaker State Oil and Refining Corporation vs. N. L. R. B.*, 119 Fed. (2nd) 631; the decision of the Fourth Circuit in *E. I. DuPont De Nemours & Co. vs. N. L. R. B.*, 116 Fed. (2nd) 388; the decision of the Fifth Circuit in *N. L. R. B. vs. Whittier Mills*, 111 Fed. (2nd) 474; the decisions of the Sixth Circuit in *N. L. R. B. vs. Sparks-Withington Company*, 119 Fed. (2nd) 78, and *N. L. R. B. vs. Empire Furniture Corporation*, 107 Fed. (2nd) 92; the decision of the Eighth Circuit in *Cupples vs. N. L. R. B.*, 106 Fed. (2nd) 100.

6. While the Court below did not expressly state the rule upon which it relied in determining that the findings of the Labor Board on issues of fact adverse to the petitioner were supported by adequate evidence, it is apparent that the Court ignored the rule enunciated by this Court in *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197, 83 L. Ed. 126, since the evidence supporting such findings of fact in most instances creates merely a suspicion and in no instance amounts to more than a mere scintilla.

7. The questions presented are of great public interest.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari, directing the United States Circuit Court of Appeals for the Sixth Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the judg-

ment and order of the Circuit Court of Appeals may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated March 2, 1942.

THE NILES FIRE BRICK COMPANY,
Petitioner,

By PAUL Z. HODGE,
GEORGE W. SECREST,
Counsel for Petitioner.



In the Supreme Court of the United States

OCTOBER TERM, 1941.

No.

THE NILES FIRE BRICK COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION.

SUMMARY OF ARGUMENT.

The proceedings in this cause and the findings and orders of the Board are erroneous and contrary to law in the following respects:

I.

CONSOLIDATION OF CASES.

In that the Board consolidated Case No. R-362, a Representation Case initiated under the provisions of 9 (c) of the National Labor Relations Act, and Case No. C-958, an Unfair Labor Practice Case, initiated under provisions of Section 10 of the Act, and introduced into evidence in Case No. C-958 the Record in Case R-362 over the petitioner's objections (R. 142 *et seq.*, 146, 147), and thereafter in said hearing failed to introduce any evidence upon the question of jurisdiction, thereby denying to the petitioner its constitutional right to due process of law.

II.**RESPONSIBILITY OF EMPLOYER FOR
STATEMENTS OF FOREMAN.**

In holding that an employer is guilty of an unfair labor practice in violation of the Act by reason of statements made by a foreman in opposition to one union and in favor of another union where such statements are made without authority in direct opposition to orders of superior officers and where such conduct on the part of the foreman was unknown to the employer's officials so as to afford them an opportunity to rebuke him and disavow his authority.

III.**ORDER NOT SUPPORTED BY EVIDENCE.**

(1) In that the finding of the Board that petitioner dominated and interfered with the formation and administration of the Independent Organization and had contributed support thereto in violation of Section 8 (2) of the Act was not supported by evidence.

(2) In that the finding of the Board that petitioner discriminated against the employees listed in Appendices A, B and C in violation of Section 8 (3) of the Act was not supported by evidence.

(3) In that the finding of the Board that petitioner discriminated against an employee because he had given testimony under the Act in violation of Section 8 (4) of the Act was not supported by evidence.

(4) In that the finding of the Board that petitioner interfered with, restrained and coerced its employees in the rights guaranteed in Section 7 of the Act in violation of Section 8 (1) of the Act was not supported by evidence.

ARGUMENT.

I.

CONSOLIDATION.

1. History of cases consolidated and order of consolidation.

On September 23, 1937, the C. I. O. filed a petition requesting an Investigation and Certification of Representatives under the provisions of Section 9 (c) of the Act. An investigation was ordered by the Board and a hearing held at Warren, Ohio, on November 1 and 2, 1937. The case was known on the records of the Board as Case No. R-362, and is hereinafter referred to as the "R" case. At such hearing, testimony was introduced by the Board on behalf of the petitioners and by the intervenors who represented another group of the petitioner's employees.

Shortly after the hearing, the secretary of the C. I. O. requested the Board not to conduct an election since it realized it would lose if one were held (R. 202). As a result thereof, the Board did not order an election and on November 15, 1937, the C. I. O. filed with the Board a charge alleging unfair labor practice on the part of petitioner (R. 202, 879). Pursuant thereto, on February 28, 1938, the Board issued its complaint against petitioner alleging that it had engaged in and was engaging in unfair labor practices affecting commerce, in violation of Section 8 (1) (2) (3) (4) and (5) and Section 2 (6) and (7) of the Act. Such case was designated by the Board as Case No. C-958 and is hereinafter referred to as the "C" case.

At the commencement of the hearing in the C case on March 10, 1938, the attorney for the Board announced the consolidation of the R case and the C case through an order of the Board dated January 14, 1938, which order had been made without notice to petitioner, the Board purporting to act under Article II, Section 37 (b) of its Rules and Regulations (R. 38). The attorney for the Board then offered in evidence the Order of Consolidation, together with the transcript of the evidence taken at the

hearing of the R case. These documents were admitted over the objections of petitioner (R. 39, 142, *et seq.*, 146, 147.) The petitioner was then denied the right to introduce evidence on the question of jurisdiction. (R. 541, 542, 543.)

2. Such a consolidation is not authorized by the Act.

(a) Section 9 (c) of the Act deals with the procedure before the Board in hearings concerning representation of employees such as was instituted in the R case, and provides in part that “the Board shall provide for an appropriate *hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise*, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives” (Italics ours). It will be noted from the above that the Board may hear an R case in a separate proceeding or *in conjunction with a proceeding under Section 10 of the Act*, which is a proceeding such as was instituted in the C case. It will likewise be noted that under Section 10 of the Act no such power of consolidation is granted. The fact is that the R case was not *heard in conjunction with a proceeding under Section 10* but was heard in a separate and distinct proceeding conducted on November 1 and 2, 1937 under a separate order of the Board. Section 9 (c) of the Act provides for a *joint hearing* when proceedings in cases under Section 9 (c) and Section 10 have been commenced but no hearing held on either. Since the hearing on the R case had been completed before the filing of the complaint in the C case, making a joint hearing impossible, it is clear that the Board was without statutory power to consolidate the two cases for any purpose.

The Board based its authority for the consolidation on Art. II, Sec. 37 (b) of its Rules and Regulations. A reading of that Rule discloses that consolidation of a complaint case with other proceedings is authorized only when the proceedings sought to be consolidated *have been instituted*

in respect thereto. The election proceeding not having been instituted in respect to the complaint case but as an entirely separate and distinct proceeding, the Board is therefore without authority under its own Rules and Regulations to make the consolidation.

If it should be claimed by the Board that it has authority under its Rules and Regulations to make such a consolidation, we are of the further opinion that such Rules and Regulations would be improperly applied in a situation such as is presented in the cases at bar. Where the Congress has laid down a specific method of procedure in Section 9 (c) of the Act, it has impliedly negated the power of the Board to follow any other procedure. The maxim *expressio unius est exclusio alterius* definitely applies and if any rule or regulation of the Board provides for such a consolidation then such rule or regulation would be without the scope of the Act and invalid.

The objection of petitioner to the consolidation is based upon sound principles of procedure and justice since the hearing in the C case was an *adversary* proceeding wherein petitioner was specifically charged with definite acts in violation of the Labor Act. The proceedings under Section 9 (c) were proceedings conducted by the Board solely for the guidance of the Board in determining the merits of a petition for certification as the bargaining agency for the employees, either by means of a direct certification or by means of an election. In such an action, it is immaterial that the employer has or has not violated the provisions of the Labor Act.

(b) In the event it should be claimed that the Board has power to introduce the record of the testimony in a proceeding instituted under Section 9 (c) of the Act in a proceeding instituted under Section 10 of the Act, and thereby, in effect, bring about a consolidation of the cases for decision, then it should be noted that the Act provides only one circumstance in which the evidence taken in a case instituted under Section 9 (c) and one instituted under Sec-

tion 10 can be considered together. This is contained in Section 9 (d) of the Act, which provides in substance that where an order made pursuant to Section 10 (c) of the Act is based upon facts certified following an investigation made pursuant to Section 9 (c) and there has been a petition filed by the Board with the Circuit Court for enforcement of such order, or an interested party has filed a petition for review of such order, then in that event such certification and record of such investigation made pursuant to Section 9 (c) shall be included in the transcript of the entire record required to be filed with the Circuit Court under the provisions of Sections 10 (e) and 10 (f) of the Act. It will also be noted that Section 9 (d) anticipates a separate and distinct hearing and then, if the employer does not comply with the order made by the Board under Section 9 (c), a further, separate and distinct hearing is had and a separate record made in proceedings under Section 10. In other words, it is not until after a petition for an order of enforcement has been filed with the Circuit Court under the provisions of Sections 10 (e) and 10 (f) that the separate records taken in proceedings under 9 (c) and 10 (e) and 10 (f) can be brought together for consideration, and they may then be considered only as separate and distinct records, complete and sufficient in and of themselves.

At no other place in the Act has Congress granted the Board power to introduce a record in a representation case into a proceeding on charges against an employer charged with an unfair labor practice and thus to permit such record to be used in conjunction with other evidence to establish an unfair labor practice in a hearing under Section 10.

The Congress having made specific provisions for the inclusion of the transcript of a record in a representation case with the transcript of a record in a complaint case (and such circumstances are not present in the case at bar), it has by implication negatived the right to include such transcript of testimony in any other kind of proceed-

ing under either Section 9 (c) or Sections 10 (e) and 10 (f) of the Act. Again the maxim *expressio unius est exclusio alterius* applies.

(c) Since the power to consolidate actions under Section 9 (c) and Section 10 (except for joint hearings) is not specifically granted, the Board has no other power to consolidate. It is a well established principle of law that while a court of law or equity has inherent power to consolidate causes pending before it under proper circumstances, yet a court, tribunal, or board of special or limited jurisdiction has no power to consolidate causes other than those specifically provided for in the statutes creating it.¹ Therefore it is clear that an administrative body such as the National Labor Relations Board, which is a creature of statute and of special and limited jurisdiction, would have no power to consolidate an R case and a C case in the absence of specific authority to do so in the Act itself. Since Section 9 (c) grants the power to consolidate an R case with a C case for the purpose of a *joint hearing* and no further power to consolidate is specifically granted, it necessarily follows that the Board is without power to consolidate the record of the testimony taken in an R case at a previous and separate hearing with the proceedings in a C case, and thereby bind the respondent in the C case by testimony introduced in the R case. Especially would this be true on such a vital issue as that of jurisdiction.

This Court has held that election or certification orders issued by the Board under Section 9 (c) of the Act are not reviewable for the reasons that, (a) no specific provision is made for review in that section, (b) that orders predicated upon the commission of unfair labor practices based on Section 10 (c) are reviewable since Sections 10 (e) and 10 (f) specifically make provisions therefor, and (c) that review of an order under Section 9 (c) cannot be based on the provisions of Section 10 (f) of the Act as

¹ 1 C. J. 1122, Sec. 311.

this section refers only to Section 10.² Applying the same method of statutory interpretation, the consolidation in the instant case is erroneous and beyond the power specifically granted to the Board, since there is no provision in Section 10 for consolidation of a case thereunder with a case instituted under Section 9 and since Section 9 provides for consolidation of a case thereunder with a case instituted under Section 10 only for the purpose of a joint hearing.

3. Even if the power to consolidate is impliedly granted, consolidation in the instant case is improper since conditions authorizing consolidation are not present.

(a) *There is no identity of parties.*³ Before actions can properly be consolidated, it is fundamental that there must be an identity of parties. In the R case, the only controversy was one between the petitioning C. I. O. and the intervenors. While petitioner was served with notice of the hearing it had no real interest in the outcome of the proceeding and was neither a necessary nor a proper party. The only possible result to it would have been notification by the Board of the designation of representatives for the purpose of collective bargaining. This was of no particular concern to petitioner since the record clearly indicates its willingness to bargain with any of its employees. In fact, faced as it was with conflicting groups of employees, it would have cleared up a disturbing situation in the petitioner's plant had a certification been made.

(b) *There is no identity of subject matter.*⁴ It is likewise fundamental that in order to authorize a consolidation, the subject matter of the causes and the questions involved in the different actions must be the same or substantially so. As already pointed out, it is clear that there is no identity of the subject matter of questions involved

² *American Federation of Labor v. N. L. R. B.*, 308 U. S. 401.

³ 1 C. J. 1125, Sec. 320.

⁴ 1 C. J. 1126, Sec. 321.

in the R case and the C case since the issue in the R case pertained only to a question of representation among the employees and the complaint in the C case charged petitioner with specific violations of the Act in engaging in unfair labor practices.⁵

4. The consolidation of these actions was prejudicial and denies petitioner due process of law.

Due process of law has been defined as a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.⁶ Applying this test, it would be clearly a denial of due process to permit the action of the Board in the consolidation of these cases to stand. It is in violation of the procedure prescribed by the Act itself, it is an exercise of power in excess of that permitted to a board of limited and special jurisdiction and it violates every known principle that would authorize even a court of law to make such a consolidation. The Labor Board should not be permitted to exercise such arbitrary power, the effect of which violates every principle established in our system of jurisprudence. To permit it to do so would be a clear denial of petitioner's constitutional right of due process of law.

It was argued in the Court below that the Order of Consolidation was procedural only and even if erroneous, on the authority of the *N. L. R. B. vs. Mackey Radio & Telegraph Co.*, 304 U. S. 333, it was incumbent on petitioner to show actual prejudice. It is conceivable that such an argument might be sound if these cases had been consolidated solely for the purpose of decision. But the Order of Consolidation was *for all purposes* (R. 38). The Board

⁵ *American Federation of Labor v. N. L. R. B.*, 308 U. S. 401, p. 405.

⁶ *Pennoyer v. Neff*, 95 U. S. 714; *Hovey v. Elliott*, 167 U. S. 409.

considered the record of the proceedings in the R case as being included in the order. When it used the evidence in that case to prove its jurisdiction in the C case and denied the company the right to introduce any evidence on the question of jurisdiction, the company was distinctly prejudiced since a substantive right had been violated, namely, the right to introduce evidence and cross examine witnesses on any essential element of the case (R. 541, 542, 543). In the *Mackey Radio* case, the error complained of was the failure of the Trial Examiner to file an Intermediate Report, which was a departure from the procedure set forth in the Rules and Regulations adopted by the Board. No substantive right was denied nor any provision of the Act violated. In the instant case a substantive right of the company was denied by the action of the Board in not following the provisions of the Act, and then denying the right to the company to disprove evidence improperly in the case. This was clearly a denial of due process of law.

The Board has sought to justify its action by asserting that the consolidation was not prejudicial (R. 39). We certainly cannot subscribe to this point of view since petitioner in the C case, in which it was charged with unfair labor practice and was vitally interested, was bound by the testimony introduced in the R case, which was purely a representation case and a case in which petitioner was not a real party in interest. The Board further seeks to justify its erroneous procedure in that the findings of the Board relating to the unfair labor practices of petitioner were not based on any testimony introduced in the R case. This is rather a naïve explanation, since if it was improper for the Board to consider the testimony in the R case in the matter of unfair labor practices, it would be equally improper to consider the testimony in the R case on the question of jurisdiction which must be established by the Board in order to enable it to make any finding whatsoever in the C case.

For the foregoing reasons, it is clear that the action of the Board in consolidating these cases was unauthorized, was beyond the power of the Board either express or implied, was contrary to all accepted principles authorizing consolidation, was highly prejudicial and was a denial to petitioner of its constitutional right to due process of law.

II.

RESPONSIBILITY OF EMPLOYER FOR STATEMENTS OF FOREMAN.

The Board and the court below have found that a foreman by the name of Simon Gagany had made statements in favor of the Independent Union and against the C. I. O. Gagany denied he made these statements. There is positive proof that the officials of the company cautioned Gagany regarding interfering in union matters. There is no proof in the record that any of the statements attributed to Gagany came to the attention of the management.

Granting that Gagany actually made the statements in favor of the Independent and against the C. I. O. that have been attributed to him, still such statements would not be sufficient to charge the company with a violation of the prohibitions of the Act. They were not accompanied by threats of coercive measures, and if they were made, were offered in a spirit of friendliness to the men under his supervision and did not have the slightest effect upon the men to whom they were made.

Mr. Clingan and Mr. Sheehan had specifically notified each of the foremen, including Gagany, that they were to refrain from interfering in union activities of the employees (R. 555, 609, 610, 695, 714, 733, 747, 758, 772). Consequently, if Gagany did make the statements attributed to him, he did so in direct opposition to the orders of his superior officers and without any authority, either actual or implied. Even if he made these statements, they never came to the attention of either Mr. Clingan or Mr. Sheehan

so as to give them an opportunity to rebuke him or to disavow his authority to make them. Clearly, petitioner is not responsible even if the statements were made.⁷

III.

ORDER NOT SUPPORTED BY EVIDENCE.

This Court has laid down a rule of construction of that part of Section 10 (e) of the Act which provides that the findings of the Board as to facts, if supported by evidence, shall be conclusive. The rule provides that the substantial evidence necessary to impart conclusiveness to the findings of the N. L. R. B. is more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion.⁸

It will be our intention in the following argument to show that the Board and the Court below failed to make application of this rule in the analysis of the evidence.

1. Company Domination of Independent.

The Board found that petitioner dominated and interfered with the formation and administration of a labor organization known as the Brickworkers Independent Organization (R. 109). The first mention in the record of an independent organization appears to have been made sometime around July 9, 1937, at a meeting held at the request of the C. I. O. between members of its committee and representatives of the company to consider the C. I. O.'s demand for a written contract. Yarwood and Liberatore, C. I. O. committeemen, testified that at this meeting Mr. Clingan, the petitioner's vice president, made a state-

⁷ *Cupples Co. v. N. L. R. B.*, 106 Fed. (2nd) 100; *N. L. R. B. v. Swank Products Co.*, 108 Fed. (2nd) 872; *N. L. R. B. v. Whittier Mills*, 111 Fed. (2nd) 474; *N. L. R. B. v. Sparks-Withington Co.*, 119 Fed. (2nd) 78 (C. C. A. 6); *N. L. R. B. v. Empire Furniture Corpn.*, 107 Fed. (2nd) 92.

⁸ *Consolidated-Edison Company vs. N. L. R. B.*, 305 U. S. 197; 83 L. Ed. 126.

ment to the effect that they should forget the C. I. O. and form a union without outside connections (R. 203-207). Mr. Clingan denied that he suggested an independent organization, but said the suggestion was first made by one of the C. I. O. committeemen. When the committee suggested an independent organization, Mr. Clingan asked that they withhold any contract for the time being, have a few more meetings in order that they might come to a common understanding and try to work up good will between themselves. He further stated that he was not going to turn down their contract entirely but that he did not want to be rushed into something that the company and the employees knew very little about at that time. He further suggested that they try to work out a common understanding so that the contract could be discussed more intelligently at a later date (R. 553). None of the employees that later became active in the Independent were present at this meeting.

Assuming that Mr. Clingan did suggest a union without outside connections, which he expressly denied, it was at most merely an expression of personal preference unaccompanied by any threat or coercion amounting to interference, restraint or domination. This would not violate any of the prohibitions of the Act.⁹

Prior to the strike, dissatisfaction among the members of the C. I. O. arose due to the attitude of its officers, particularly Liberatore, its president. This was due to his antagonistic attitude toward the company, his abusive and insolent manner, and his frequent fits of anger in his dealings with the company (R. 232, 293, 307, 321, 323, 337,

⁹ *Kiddie Kover Mfg. Co. v. N. L. R. B.*, 105 Fed. (2nd) 179; *Midland Steel Products Co. v. N. L. R. B.*, 113 Fed. (2nd) 800; *Nebel Knitting Co. v. N. L. R. B.*, 103 Fed. (2nd) 594; *Virginia Ferry Corp. v. N. L. R. B.*, 101 Fed. (2nd) 103; *Continental Box Co. v. N. L. R. B.*, 113 Fed. (2nd) 93; *Jefferson Electric Co. v. N. L. R. B.*, 102 Fed. (2nd) 949; *N. L. R. B. v. Lightner Publishing Co.*, 113 Fed. (2nd) 621; *N. L. R. B. v. Union Pacific Stages*, 99 Fed. (2nd) 153.

338, 342, 623 to 633, 789). This same attitude was amply displayed at the time of the hearing (R. 332, 334, 336, 339). This dissatisfaction became increasingly apparent at a meeting of the union on July 19, 1937, held to consider the question of whether or not a strike should be called (R. 788 *et seq.*, 808 *et seq.*, 817, 818, 854, *et seq.*). At this meeting, some of the members wanted the strike vote to be taken by ballot, but Liberatore, under C. I. O. organizer Payne's guidance, dictated that it should be a rising vote. C. I. O. members from other industries, including striking Republic Steel employees, were present in the room and Liberatore was accused of counting them among those who voted for the strike. These and other occurrences caused such dissension and discord among the members of the C. I. O. that a large number of them began a separate movement to oppose the strike. This marked the beginning of the so-called Independent (R. 788, 808, 835, 854, 857).

A C. I. O. member by the name of Avery Tackett was present at the meeting and at its conclusion left the room and talked with other union members. He learned that they, like himself, were not satisfied with the calling of the strike. Upon learning this, he proceeded to the home of one Matteo, another C. I. O. member who had taken the floor in the meeting and had protested against the methods used in conducting the vote, where he discussed the matter with him (R. 855).

On the picket line the following day, Tackett and Matteo learned that a large number of the C. I. O. members were dissatisfied with the leadership of the union and felt that they were not being kept informed as to union matters (R. 791, 792). Whereupon they approached Liberatore, C. I. O. president, on the picket line, told him the attitude of the other union members and their desire to return to work under any conditions (R. 311, 792-856), and suggested the adoption of Tackett's idea of approaching the company on the proposition of a contract with an independent

organization. Liberatore gave them authority to see what they could do. Thereupon a conference was arranged with the management which was attended by Yarwood, Tackett, Matteo, and Sabo, at which the proposition of an independent contract was presented to the company. Mr. Clingan stated that he would consider anything (R. 169, 170, 311, 312, 313, 791, 792, 793). The unpopularity of the strike finally became so apparent to the officers of the C. I. O. that a meeting was held on August 1, 1937 (R. 157, 616), and the strike formally called off.

The undisputed evidence is, therefore, (1) that the Independent Union had its inception among the union members themselves, (2) it grew out of the dissatisfaction of the majority of the employees in the calling of the strike (R. 857), (3) that the idea of forming an independent organization originated with Tackett (R. 859), and, (4) it did not grow out of any act or suggestion on the part of the company.

After the strike had been called off and the men had returned to their work, antagonism existed among the employees. Tackett and Matteo learned that a majority of the men favored some organization other than the C. I. O., which led them to have membership cards printed and to start a drive to secure members for an independent organization (R. 793-857). Solicitation of members continued for a short time when Yarwood, C. I. O. Secretary, threatened Tackett that he would get into trouble if he continued his independent union activities. This apparently frightened Tackett since little was done to secure further members until sometime during November or December of 1937. Acting upon the advice of their attorney, Independent Union members began solicitation (R. 858), with the result that 177 employees out of 200 eligible signed independent union cards (R. 793). Most of this solicitation was done by Tackett, assisted by Matteo, Aubrey Sheehan and Wallace, all employees of the company, and all members of the C. I. O. (R. 814, 818, 840).

When a majority had signed, Tackett and Matteo approached the management to inquire about a contract with the new organization. Mr. Clingan did not promise them what he would do but advised them that if they had anything to present he would consider it. This caused the Independent Union members to call a meeting, elect officers and consider the formation of a contract to be presented to the company (R. 794, 795). Shortly thereafter the complaint in the instant case was filed charging company domination of the Independent. The Independent was served with a copy of the complaint, accompanied by notice of hearing (R. 39 Note). No contract had been presented to the company at the time of the hearing of this cause.

In the face of the foregoing undisputed facts concerning the beginnings and the activities of the Independent, the Board was compelled to base its finding that the Independent was company sponsored and dominated on the inference raised by the fact that Matteo and Aubrey Sheehan were the son-in-law and son, respectively, of General Manager P. J. Sheehan; and that foreman Simon Gagany spoke in favor of an Independent union.

Any finding which may have been made with respect to company domination of the Independent, on account of the relationship existing between these men and Mr. P. J. Sheehan, is founded purely upon suspicion and is contrary to any reasonable and sensible interpretation of the facts as they appear. The undisputed fact is that Mr. P. J. Sheehan, the general manager, never talked to either his son, Aubrey Sheehan, or his son-in-law, James Matteo, about the C. I. O. or the Independent (R. 620-621). There is nothing in the record other than the bare fact of relationship upon which such a finding could be based. To charge the company with domination of the Independent on that fact alone is contrary to the rule of substantial evidence as enunciated by this Court.

2. Individual Discriminations and Discharges.

Before discussing the charges of individual discrimination against certain individuals, we desire to comment on plant operations immediately after the strike and on certain other elements applicable to most of the names under discussion.

At the time the strike began, eight kilns were being burned (R. 733). Ordinarily, it takes eleven to thirteen days to complete the burning of brick in a kiln, and the evidence shows that brick in the kilns had been burning only two days prior to the strike (R. 436). When the men went on strike, they left the kilns without anyone to attend them with the result that they were sealed and were not reopened until the strike was over. When the plant resumed operations, it was necessary to reopen these kilns to determine the condition of the bricks and to see if they were still fit to continue their burning (R. 244). New brick had to be made and the empty kilns filled. In other words, operations had to start from the bottom and it was impossible to give all of the men employment immediately upon the termination of the strike. The plant was only operating during the day, and night turns were not started until later (R. 616, 617). Consequently where a C. I. O. member reported to work on August 2 and was not given immediate employment, the Board has found that the company discriminated against him as of that date. This is the situation in every instance in the cases of those employees listed under Appendix A and Appendix B of the Board's finding (R. 114) where the alleged discrimination began on August 2, 1937. At no place in the record is there any showing that work was available for these men on that date. In fact, this condition of inability on the part of the company to absorb all of the employees immediately following the strike continued for several weeks after the Reichert Conference on August 18, since those men who were given employment following that conference had to be given work

on other jobs or in other departments until work at their old job became available. Therefore, the arbitrary fixing of August 2 as the date of the beginning of the alleged discrimination was without any factual justification and directly contrary to the physical situation with respect to employment immediately following the termination of the strike. Consequently the Board was not justified in making findings in favor of the employees listed in Appendix A and Appendix B because of alleged discrimination between August 2 and the date of the reinstatement after the Reichert conference in the face of specific proof that employment was not available for all.

This brings us to one other point that appears in the cases of most of the men in whose favor the Board made findings. That is the so-called Reichert conference. The Board gives credit to this conference for the return to work of many of the employees who did not receive work immediately following the strike. It seems to regard the Reichert conference as a black mark against the company in that it shows how the petitioner was forced by the Federal Department of Labor to do what it had wrongfully refused to do.

The true situation is that the company was confronted by its inability to absorb all of its employees after the strike. This condition following on the heels of the strike caused unrest and apprehension among those not yet employed, which resulted in the appearance of Mr. Reichert, a conciliator from the Department of Labor in Washington. He carried with him no authority or power of compulsion which the company was bound to recognize. He had only the power of persuasion. Petitioner entered wholeheartedly with him in an attempt to solve mutual problems. It even gave employment to those whose services were not actually needed at that time, by giving them work in other departments and as a result the existing issues were settled. So, instead of looking at the Reichert conference as a black

mark against the company, as the Board has done, it should be regarded in its true light, namely, a conscientious and sincere attempt on the part of the company to cooperate with a respected arm of our government in solving a situation which was a mutual problem for both.

Paul Yarwood (R. 66). The Board has found that Yarwood received no work during the period of August 2 to August 18 and finds that this was because of discrimination due to his union activity. The real reason was that he did not apply for work. Only on one occasion did he approach Mr. Sheehan or any of the foremen regarding work and that was during one of the Reichert conferences (R. 160, 635). The real reason why Yarwood did not work during that period was that he "couldn't go back to work and work with those men," referring to the men who had gone back to their work before the strike was terminated (R. 634, 635). It was not until Yarwood met with Mr. Sheehan and Mr. Reichert that he finally did decide to return to work.

In dealing with the period from November 1, 1937 to the date of the hearing on March 10, 1938, the Board has made the following findings respecting Yarwood: (1) that he was discriminated against for having given testimony under the Act on November 1 and 2, 1937 by receiving less work, (2) that from the period of November 13, 1937 to December 3, 1937 he was discriminated against by being demoted from his regular work and given jobs with less pay, and, (3) that on December 3, 1937 he was discharged and had received no employment up to the time of the hearing on March 10, 1938.

(1) The fact is that after the hearing Yarwood did not report for work until November 12. About November 1, Yarwood reported to his foreman that he would not be out to work since he was going to drive his car on election day for which he would receive the sum of ten dollars (\$10.00).

When he did report on November 12th he was asked why he laid off so long and answered that one of his children had the measles and that he had to stay at home to take care of it (R. 688, 689). There is no place in the record to indicate that Yarwood did report for work before November 12 (R. 697). None of these facts are denied by Yarwood or any other witness. It is therefore conclusive that Yarwood was not denied employment because of his having testified at the hearing on November 1 and 2 since he was given employment the same day he reported. In connection with the Board's finding that Yarwood did not receive much work during November, it should be noted that production during this month dropped to 300,000 brick as compared to an average monthly production of approximately 940,000 brick for the three preceding months (R. 936).

In the face of these undisputed facts, it is beyond reason that the Board should find that Yarwood's lack of employment was due to discrimination against him because he testified in the hearing before the Board.

(2) With respect to the finding that Yarwood had been demoted during the period from November 13 to December 3, the record shows that on three different occasions in one week Mr. Clingan saw Yarwood dump brick (R. 557 to 560) and finally called it to the attention of sub-foreman Foster under whom Yarwood worked. Foster told Clingan that this was not an unusual thing but had happened quite often and that he had observed him on ten or twelve occasions dumping brick (R. 780, 781). Mr. Clingan notified foreman Murphy that Yarwood was spoiling a lot of brick and told him to take him out of the shipping gang and give him something else to do (R. 685). Yarwood did receive such other employment as operations in the plant permitted until December 3, 1937. This was a demotion due to inefficient work without any relation to union activity.

(3) With respect to the alleged discharge of Yarwood on December 3, 1937 and the finding that he received no

employment up to the time of the hearing on March 10, 1938, we call the Court's attention to the statements above regarding plant operations during the month of November 1937. This condition continued during the months of December, January, and February. Production in the month of December was 405,000 brick, January 557,000, and February 87,000. It was because of these slow operations that Yarwood did not receive work during the latter part of December and during the months of January and February. When production was stepped up in the month of March, Yarwood was given employment and was working at the time of the hearing (R. 200). When the Board finds that Yarwood was discharged on December 3 and was not working at the time of the hearing it does so in face of undisputed facts to the contrary.

John Bacos. John Bacos was employed in the labor department as a kiln fireman. It has heretofore been brought to the attention of the Court that at the time the men went on strike, some of the kilns were loaded and on fire. Inasmuch as it was necessary to examine these kilns to ascertain the amount of damage done due to the sealing of the kilns during the strike, it was impossible to refire some of them for several days. For this reason and for the further reason that new brick had to be made and the empty kilns set, several of the kiln firemen could not be returned to work for some time after the plant resumed operation.

The Board has found that Bacos was returned to work as a result of the Reichert conference on August 18. This is not correct since Bacos himself testifies that he went to see Mr. Sheehan and Mr. Sheehan put him back to work on the same job, under the same foreman, and the same day he applied (R. 458, 459). Bacos states as the reason for his not receiving work was that a man by the name of Joe Corda had been employed in his place. An examination of the record and exhibits does not show an employee by the name of Joe Corda.

The Board has also found that Bacos was given no work after November 12, 1937 because of his union activities. We find no basis for such a statement and, as a matter of fact, at that time he was engaged in what the Board brands as a company dominated Independent Union activity, having signed the petition opposing the C. I. O. election (R. 942). The real reason for Bacos' lack of employment, after November 12, was the slump in plant operations that began about this time and continued to March 1938 (R. 936).

The Board has found that the company hired two new men by the names of Joseph Demeritz and George Johnson as laborers. John Bacos was a kiln fireman. For that reason Bacos cannot claim that he was discriminated against because of the hiring of these men.

The Board has not shown any union activity on the part of Bacos which would cause the company to discriminate against him nor justify the Board in finding that he did not receive work because of his union activity.

Nick Nacco (R. 71). After the strike Nick Nacco returned to work on August 18. He continued to work at his regular employment as shipper until December 3, at which time the petitioner's business became such that it was necessary to cut down the force in the shipping department (R. 689, 690).

Nacco was not put to work immediately after the strike because there was not much shipping. Mr. Sheehan testified that Nacco approached him at the gate one morning and asked for work. Sheehan then went into the plant to find out if any shippers were needed and upon learning that only three shippers were working that day, and as the other men had been returned home, Sheehan came out to advise Nacco and found that he had gone home (R. 636). This is borne out by Nacco's own testimony, where he admitted that he saw some of the men in the ship-

ping department going through the gate and then admitted that only a part of them stayed in (R. 262, 263).

The Board erroneously finds that two employees, Hunter and Taylor, with less seniority rights than Nacco, were retained. Taylor left the shipping department on October 28 and Hunter left on September 24 (R. 700), which was prior to December 3, when Nacco ceased to receive work. Hunter and Taylor did receive some work in other departments under other foremen after they left the shipping department.

Upon this point we find numerous instances in which the Board has erroneously found that the seniority rule as applied by Petitioner referred to seniority in the plant as a whole and was determined by length of service with the company. On the contrary, it was a matter of seniority in to each department. A large portion of the employees are skilled men and trained for work in the department in which they are employed. In other words a molder would not necessarily make a good shipper, neither would a shipper make a good pressman, and likewise a kiln fireman is skilled in his line of work and would not be able to qualify for some other position (R. 714). Men in each department were employed by the foreman of that department and not through a central employment agency. (R. 160, 656). While the company had no hard and fast seniority policy it was customary, in giving employment to the men, for the foreman in each department to give the work in his department to the oldest men when it was necessary to reduce operations (R. 690, 755, 756, 757, 772).

As has been shown, Nacco was a shipper and his foreman observed the seniority rule as it applied in the department in which he was employed. His foreman was powerless to place him in another department since that was a matter for another foreman and might have meant discrimination against some other employee in the other department.

Harry Evans (R. 73). Harry Evans was employed as a wheeler in the shipping department (R. 494). He was not returned to work until August 18, for the reason that there was no work for him to do. Mr. Sheehan told Evans sometime about August 2 that he did not need shippers at that time, but told him that as soon as there was work it would be given to him (R. 655, 656). That this condition is true is indicated by Evans himself when he testified that about August 1 there were only a few shippers put to work (R. 512). He was returned to work on August 18 when shipments required more men. Evans worked steadily from August 18 to December 3 when he states that, because of an injured foot, he was unable to work until January 2 (R. 498). Evans by his own admission was one of the slowest men in the plant and for that reason had difficulty in getting on a gang with other men (R. 495, 690, 691).

The fact that operations in the plant were slow (Resp. Exh. 4) coupled with the fact that Evans was the slowest man in his department and had difficulty in getting other men to work with him, is the reason he did not receive employment after January 2.

The Board has found that Mr. Higgins, Petitioner's paymaster, asked Evans sometime during the month of December 1937 if he would absent himself during the hearing of this case. This is clearly an erroneous finding based on a false statement on the part of Evans since the complaint in this case was not filed until February 28, 1938. This willingness on the part of Evans to misinterpret statements made by those in authority is further borne out by his conversation with Mr. Sheehan at the time a booze party was being held by the C. I. O. When Mr. Sheehan attempted to give Evans a little fatherly advice concerning his drinking, he immediately attempted to interpret it as an interference with his union activities (R. 508).

Alex Miller (R. 76). Alex Miller was employed as an extra kiln fireman (R. 729, 730, 731). As has been previously shown in the general statement preceding the considering of individual cases hereunder, it was necessary to open and examine the kilns after the strike to determine whether or not the contents had been damaged. This necessitated some delay in getting the kiln firemen back to their work. Miller, being an extra kiln fireman, was not returned to his work until August 19 after the regular firemen had been assigned. During the balance of August and the months of September and October, Miller had no complaint. The evidence shows that Miller did not work after October 29, 1937.

After October 29 Miller did not report to work very frequently. In fact, for a period of four months prior to the hearing, he had not shown up for work at all (R. 733). As previously stated, plant operations during November were the lowest of any time during the year. That was a situation over which the company had no control, but the record does show that if he had been available he would have received work during January and February. His foreman had attempted to locate him but was unable to do so (R. 733). Miller was never discharged but rather was neglectful in reporting for work after October 29. The record further shows that his failure to receive work was not because he was replaced by any other employee (R. 732).

Miller testified that John Santangelo and George Infante, both of whom had less seniority than himself, were employed during the period from August 2 to August 20. The Board found that other men listed as kiln firemen and with less seniority than Miller were working during the period of August 2 to August 20, and that some of these kiln firemen were retained after Miller's last work on October 29. An examination of the testimony of Miller's foreman will reveal the true history and employee status of

this man (R. 729 to 732). Petitioner had done everything in its power to give him employment but his desultory methods of work were such that he could not be considered a responsible employee. He was so slow that other men refused to work with him. In addition to being the slowest worker in the plant, the record shows that he was continuously fighting with the other men in his gang and on several occasions they threatened to quit if Miller were retained. As a result of this he could be used only as an extra man and had been so considered since 1936. The record also indicates that intoxication was one of the main reasons for his lack of steady employment. While Miller may have had more years of service with the company than others listed as kiln firemen, yet his inability to do responsible work or work in harmony with other men kept him from becoming an employee with the status of regular kiln fireman such as some of the other men in the department with less seniority.

It is therefore clear that Miller's lack of employment had no connection with his union activities. It was caused by a combination of economic conditions, his own inability to perform the work of a regular kiln fireman, and his own neglect in reporting regularly for work.

Joe Villio (R. 79). Villio was an extra man in the clay yard and made only nominal earnings, even prior to the strike. In the month of May 1937 he earned \$5.10, which was a month when operations of the plant were below normal. In June, when operations continued to be below normal and the plant worked only a small part of the time, he earned nothing. This was before any matter of union activity arose in the plant. Consequently, when the plant resumed operations in August, and worked with only one turn for several weeks (R. 617), the fact that Villio was not given work until the middle or latter part of August, when the plant began to again operate near normal does

not show any change in his status. During the month of September the record shows he made his best earnings of the year. This was continued during the month of October. It was not until the November slump when the plant was operating about 25% capacity that his work dropped again. That the company had no ill feeling against this man because of union activities or any other reason is evidenced by the fact that during the month of December, when operations were extremely slow and he would normally have received no work, they did give him sufficient time to enable him to earn enough money to pay the premium on his group insurance in the plant, thus clearly indicating the intention of the company to keep this employee in good standing and to give him further employment as soon as conditions in the plant permitted (R. 271). This is simply another instance in which the company found it impossible to give steady employment to all of its employees during a time of reduced operations, at which time it was attempting to give preference to those older in point of service, those who had families to support, and those classified as regular employees and not as extras, as was Villio.

The Board attempts to attribute Villio's lack of work to certain statements which Villio claims were made to him by Matteo and foreman Gagany concerning membership in the Independent (R. 268, 269). These statements were specifically denied by both Matteo and Gagany (R. 797, 751), and there is nothing in the record to show that these statements had anything to do with Villio's lack of work. In fact, his lack of work began before he was ever solicited to join the Independent. Therefore, in view of this man's past work record and in view of the specific denial of both Matteo and Gagany, it is clear that the finding of the Board with respect to discrimination against him is a finding based purely on suspicion and not with any substantial factual basis.

John Toth (R. 83). The Board has found that petitioner refused to reinstate Toth from August 2 until September 1. Immediately following the strike, Toth applied to Mr. Sheehan for employment and Mr. Sheehan gave him a note for work directed to his foreman. Toth claimed that he presented this note to his foreman but that he was refused employment (R. 236, 246). The reason for Toth's failure to obtain work on August 2 was that he was only an extra kiln fireman and there was very little work for the kiln firemen at that time as has been previously explained in other portions of this brief (R. 748).

Before work was available Toth became involved in an affray on August 7 together with Hemen Estes, Avery Tackett and others, with the result that Toth and Estes were both shot by Tackett (R. 163, 164, 403, 404). All three men were bound over to the Grand Jury as a result of affidavits which were filed charging them with criminal offenses. By reason of the fact that Avery Tackett was only laid off until August 11 whereas Estes and Toth were not given employment until September 1, the Board has come to the conclusion that Estes and Toth were discriminated against because of their C. I. O. affiliations and that Tackett received more favorable consideration because of his Independent Union activities. This conclusion of the Board is based purely upon suspicion since the reason for Tackett's reemployment on August 11 is fully and reasonably explained. Tackett was an expert setter and when a setter was badly needed and no one else was available, Sheehan sent him to work (R. 678). Neither Estes nor Toth were employees whose places could not be readily filled during their suspension. There is no place in the record to show that the management at this time knew anything of Tackett's union activities, and there would have been no reason for any discrimination on that ground (R. 678).

It is also rather strange that the Board should find that the failure of the petitioner to give employment to

Estes and Toth after August 7 was due to discrimination because of union activity, when the record shows that in the fracas of August 7 Estes was shot in the foot (R. 403) and Toth was shot to the extent that he was wearing a bandage on his head up until the time he returned to work on September 1 (R. 635). The evidence in the record is clear that neither of them would have been able to work during that period of time even if work had been available for them. After the Grand Jury had disposed of Toth's and Estes' cases and as soon as they were able to work, they were given employment.

Hemen Estes (R. 81). The Board has found that the Respondent discriminated against Estes from August 2 to September 1 and on December 28 discharged him because of his membership and activity in the C. I. O. union. With respect to the period of August 2 to September 1, the Board is clearly in error. In the first place Estes did not apply for work after the strike until August 31, and was put to work the next day (R. 410). In the second place from August 7 until September 1 employment was withheld from Estes for the reasons heretofore stated in our comments on John Toth.

With respect to the discharge on December 28, the record discloses that petitioner's plant was closed entirely from December 13 (R. 390) to December 28 (R. 82, 392) and that thereafter the department of the plant in which he was employed operated only from 15% to 20% capacity (R. 711), thus making it necessary to materially reduce employment (R. 936). Mr. Stover, Estes' foreman, stated that he did not discharge Estes but since he was considered an extra man, no work was available for him for several months. Mr. Stover did place one Roy Boggs, an employee of the company since 1927, on the work Estes had been doing when it became necessary to curtail operations (R. 711, 712). During the period from September 1 to the closing of the plant on December 13, Estes had no complaint

to make concerning his treatment nor the amount of work which he received (R. 400). It is therefore clear that petitioner had no intention or desire to discriminate against this man because of his union activities, but that his lack of employment after December 28 was due to an economic condition over which it had no control.

If, as the Board contends throughout its finding, that petitioner was discriminating against the members of the C. I. O. and looking with favor upon those interested in the Independent, that argument must fail because early in December Estes became interested in the Independent and solicited a fellow workman by the name of Cliff Cleffinger for membership in that union, and later, around Christmas or New Year's, signed an Independent card himself (R. 394, 395, 396).

Alfred Whitt (R. 85). The Board has found that because of union activities Whitt was refused reinstatement from August 1 to August 18. Prior to the strike Whitt was employed as a clay press operator. After the strike this press began operating only one turn and this work was given to John McMahon, an old experienced operator with greater seniority than Whitt (R. 641, 642, 643, 771). The Board admits this situation to be true but claims that due to alleged hostility of the company toward Whitt, he was not given any work even though work was not available on his regular job. This finding was based on the alleged fact that Mr. Clingan showed resentment toward Whitt by calling him and Yarwood "rats and nuisances to the company." This incident is hereinafter discussed (page 55, *infra*).

To further substantiate its finding of discrimination the Board finds that five new laborers who were hired during the strike worked during the month of August, and that Whitt should have been given some of this work. Only one of these is designated by name, namely Donald

Underwood. George Donald Underwood was employed July 19, 1937 and worked until November 13, 1937. We know of no obligation to Whitt which would require the company to discharge Underwood in favor of Whitt, especially in view of the fact that Underwood was not working on Whitt's job, nor was he working in Whitt's department. As hereinbefore explained, seniority rights applied solely to the men working in each department. (See heading "Nick Nacco" *supra*.)

As further evidence that petitioner discriminated against Whitt the Board goes completely outside of the realm of relevant evidence and points out that in December an employee one Roy Boggs was given one Estes' job because Boggs was not identified with the C. I. O. Several places in its decision, the Board has found that Roy Boggs was favored over C. I. O. employees after the strike. Roy Boggs, although employed since 1927, received very little work during the months of June and July, received no work whatsoever during the months of August and September, and very little thereafter up to the date of the hearing. It should be noted in this connection that the discrimination against Whitt is alleged to have taken place during the first half of August and that Boggs was not placed on another job until December. If after the strike, the company were inclined to favor Boggs because of his non-union activities and discriminate against union members, it is evident that he would have been given work during the month of August, when the discrimination against Whitt and other C. I. O. members was alleged to have taken place. Had the company desired to discriminate against Whitt, it would not have given him any employment until his regular job was open. Instead they put him to work as a laborer until he could return to his regular employment or its equivalent. Whitt himself says he does not think that Mr. Sheehan is a man who would discriminate against the employees because of union membership (R. 290).

Parenthetically at this point we call to the attention of the Court, in connection with the Company's alleged partiality in favor of Independent members, the fact that most of the witnesses called by the Board who complained about the amount of work they were receiving were members of the Independent. These witnesses are John Toth (R. 238), Lawrence Infante (R. 300), Carmen Villio (R. 349), Anthony Villio (R. 373), Alex Sabo (R. 356), Alex Miller (R. 432), Albert Lazzari (R. 455), Lawrence Preziuso (R. 463), John Cline (R. 485), George Bako (R. 519), Hemen Estes (R. 396), and Floyd Heintzelman (R. 482).

Thomas Liberatore (R. 88). The Board has found that Liberatore was discriminated against because of union activities between the dates of August 7 and 18. Liberatore did not return for work after the strike until August 7, when he appeared at the gate house and called to Mr. Sheehan through the fence saying, "P. J., I am ready to go to work now," to which Mr. Sheehan replied, "well if we have anything to do, we will be glad to put you on" (R. 310, 645). The Board has commenced its period of alleged discrimination as of that time even in the absence of a showing that work was available for him.

The closing of the period of discrimination was fixed as August 18 because on that date Liberatore was informed by the company that he could not be returned to work until after a physical examination by a tuberculosis expert. The Board under these circumstances reasons that since Liberatore was not notified of the necessity of a physical examination until August 18 he was therefore discriminated against during the period of August 7 to 18th. We believe that this finding is not based on substantial evidence since the record is clear that (1) Liberatore did not return for work after his talk with Mr. Sheehan on August 7 until after his physical examination and, (2) because no work was available for him since his job as an operator of the clay cracker had been abandoned (R. 647).

The reason for the company's refusal to give Liberatore employment following the strike (in addition to the fact that his job had been abandoned) was that he had a few years previously been a patient in the Trumbull County Tuberculosis Sanitarium. According to the record, a state law became effective either July 15 or August 15 making silicosis a compensable occupational disease (R. 646).¹⁰ This law came to the attention of the management and a question immediately presented itself as to the advisability of placing Liberatore at work where he might be subjected to silica dust. It was thereupon thought necessary for his own as well as the company's protection that he have a physical examination and a certificate from a physician as to the status of his former illness. The company furnished transportation for Liberatore to the Tuberculosis Hospital where he was examined and the doctor's report recommended that he be given work in the open air if possible (R. 331, 645, 647). As soon as this report was received, he was given such employment on September 1 which continued until he quit his job October 29. The Board's finding that Liberatore's union activities kept him from work during the period from August 7 to August 18 is without foundation of fact or inference.

Wendell Matthews (R. 90). The Board has found that petitioner discriminated against Wendell Matthews because of union activity in that he did not receive employment during the period of August 2 to August 19. The reasons for Matthews' failure to obtain work before August 19 are two fold: (1) Matthews approached Mr. Sheehan about work only once after the strike and then in an intoxicated condition, and (2) because of a shortage of work around the kilns (R. 653, 654). The Board has

¹⁰ On July 31, 1937 Section 1465-68 (a), Ohio General Code, making silicosis a compensable occupational disease became effective.

found that Matthews' condition of intoxication was not the reason for refusing him employment because Mr. Sheehan did not testify that such was the reason. Such an argument has no merit since neither petitioner nor any other responsible company would have put this man to work in a state of intoxication. The other reason namely, a shortage of work, has been commented upon before. Matthews was a kiln laborer and immediately following the strike it was necessary to examine the kilns that had been sealed, make new brick, and fill the empty kilns before work was available for all of the kiln firemen or kiln laborers.

In a further attempt to substantiate its finding that Matthews was discriminated against because of union activity, the Board calls attention to Matthews' testimony (R. 443) wherein he says that foreman Gagany told him he shouldn't sign up with the C. I. O. "as a man with a big family should keep away from it." This was at most nothing but friendly advice. However, Matthews stated further, "I didn't say nothing. Because I told him I didn't sign it." With that statement it would appear that his foreman would have information that Matthews was not a member of the C. I. O. and, consequently, even if he had desired to discriminate against union members, he would have no reason to discriminate against him.

Anthony Villio (R. 92). The Board has found that Anthony Villio was a presser in the clay department, a member of the C. I. O., that he went out on strike, was on the picket line, was a committeeman for the C. I. O., and that he was not reemployed after the strike until the Reichert Conference. It is true that Villio did not commence work after the strike until August 18 but it was not as a result of the Reichert Conference as found by the Board. According to Villio, he saw Mr. Clingan himself on August 18 and asked him if there was anything he could do, to which Mr. Clingan replied: "I will see if I can't get you to work in the shipping end." Mr. Clingan then called

Murphy, shipping foreman, who placed Villio at work, which was a better job with better pay than he had before the strike. He remained in this department for a period of two or three months and then went back to the clay department, where he had worked prior to the strike (R. 371, 385). He did not receive work in the clay department immediately following the strike because only one turn was working, and only the oldest employees were put on. This was due to the fact that only one-half of the plant was operating (R. 771, 772).

Villio complained that one Huffman (Hoffman) had been put on his job in the clay department (R. 378, 379), and the Board points out with certainty that this fact shows discrimination against Villio because of his union activity. The payroll record discloses the following comparison between the earnings of Huffman and Villio:

<i>Month</i>	<i>Huffman</i>	<i>Villio</i>
September	\$112.56	\$130.94
October	\$ 89.12	\$125.02
November	\$ 26.80	\$ 36.60
December	\$ 42.88	\$ 44.80
January	\$ 69.68	\$ 77.96
February	\$ 29.81	\$ 33.12

If Huffman did work on Villio's job and Villio was being discriminated against because of union activity, then we imagine that Mr. Villio would be more than content with such discrimination and would like more of it. Even though Villio was a C. I. O. member and a committeeman in that organization, he was given preference over Huffman, a member of the Independent (R. 379). As stated before, immediately following the strike everyone could not be returned to work at once and the fact that Villio obtained no work until August 18 was due to this fact, and not by reason of discrimination because of membership in the C. I. O.

Alex Sabo (R. 93). The Board has found that Sabo worked as an off-bearer in the clay department and that he served on various union committees which met with the company before the strike. The Board is in error in these findings as Sabo was employed in the silica department and served on only one committee and that was after the strike (R. 353, 354). The Board has further found that Sabo first applied for work after the strike on August 14 but was not reinstated until August 21 having been discriminated against during this period of time because of his union activities.

The conceded fact is that when Sabo went to see Mr. Sheehan about returning to work he became angry to the point that Mr. Sheehan had to tell him to go home and "cool off" and to return when he was in a better frame of mind (R. 648, 649). Sabo's testimony reveals his attitude and discloses the real reason for his return to work as well as his failure to work prior to August 21. He said, "but Mr. Sheehan said he couldn't do nothing for me, so I got mad, and I went back home, and my wife got after me then, and I went back down there, and I saw Mr. Sheehan again, and I said, '*I got to make up my mind to go back to work or else*'" (R. 353, 359). He told Mr. Sheehan he was sorry for "blowing off." Sheehan immediately said, "all right, Alex, I'll take you back." He was given a temporary job for a short time and then given work that was easier than his work before the strike but with the same pay (R. 367). There is, therefore, no basis for the finding of the Board that he was discriminated against because of union activities.

Anthony Nardo (R. 94). This man was employed as an extra laborer (R. 470) and had been with the company less than two years. He said he was a member of the C. I. O. Union, went on strike and served on the picket line, where all the foremen saw him. Immediately after the strike he was returned to his work (R. 466). If peti-

tioner had been discriminating against C. I. O. strikers as has been charged by the Board, Nardo, together with more than 150 other union men, would not have been returned to his work immediately after the termination of the strike.

The Board predicates the finding that he received no work after November 23 on the fact that he refused to sign a petition opposing an election among the employees of the plant when asked to do so by one Shannon, a truck driver (R. 467). The record shows that Shannon was merely a fellow employee without any connection with the management and with no authority to speak for it. The company should not be charged with what appears to be purely sales talk on the part of one of its minor employees without supervisory authority. Certainly there cannot be any discrimination because of union activities charged against the company on such reasoning as that.

An examination of the testimony of Nardo will reveal that the Board has grasped at a very flimsy basis upon which to charge petitioner with discrimination against him. Nardo had no regular job and was considered an extra man to be used when and if necessary at any laboring job around the plant. He mentions that he did have a job cleaning the boilers, which he performed on Sundays. However, the kiln firemen demanded that they do that work themselves, which left Nardo without any definite employment other than extra labor. When he inquired of his foreman why he could not get work he was told that work was slack and the little work there was to be done would possibly be done by the firemen and the shipping gang (R. 470-471).

Again the Board finds in connection with Nardo that a number of employees with less seniority than Nardo, who are not named, were retained. Since petitioner made no explanation of its departure from the seniority rule in the case of these unnamed employees, the Board says it must be presumed that Nardo was discharged because of

his C. I. O. activities. We have searched the record and are unable to find where the situation regarding these so-called "number of employees with less seniority than Nardo" were discussed or where any explanation was required. Since the Board has not named these employees we would be compelled in the first instance to guess who they are and then raise the inference against these unknown employees that they were non-union or Independent men, whom the company desired to favor over Nardo.

Mike Infante (R. 94). This man, like Anthony Nardo, was a C. I. O. member, went on strike, and was active on the picket line. He was immediately placed at work by the company at the conclusion of the strike. He had no complaint about his employment until in the month of December, at which time, he testifies and the Board so finds, that his job as a hacker was abandoned and was being done by other members of his crew (R. 651). Notwithstanding this fact the Board finds that he should have been given some other employment. With working conditions as they were during this period, with the plant closed down from December 13 to December 28 and operating only 15% to 20% capacity, it is not surprising that there was no work for Infante without discharging another employee to make room for him (R. 711).

The Board says that Infante's "buddy" was retained. Infante did not disclose the name of his "buddy" but the Board finds him to be Joe Toney Ceroli, who was retained after Infante's employment had ceased. There is no justification for this finding. This is another instance where the company is charged with failing to make an explanation of something that was not brought up in the trial of the case. The fact that Ceroli's status as an employee was never brought into question at the hearing is sufficient excuse for petitioner as there was nothing to explain.

The Board has based its findings of discrimination largely on the refusal of Infante to sign with the Independent when asked to do so by Aubrey Sheehan. The Board finds that Aubrey Sheehan induced petitioner to dismiss Infante. This finding is not supported by any evidence and the record does not contain anything which would even suggest such a situation.

Sometime during the latter part of December 1937 or the first part of January 1938, Infante together with two other employees approached P. J. Sheehan and asked him if they should join the Independent. Sheehan told them to go back to their work as they should know better than come in and ask him what to do in this matter (R. 620). In October we find Infante dissatisfied with the C. I. O. as he signed the petition protesting the holding of a C. I. O. election (R. 941). From this it is apparent that Infante was not an active C. I. O. member. In the face of these facts the Board is clearly in error in finding that he was discriminated against because of C. I. O. activities, since his only activities in that connection were that he joined the C. I. O., went on strike, and was on the picket line. The fact that he was given work immediately after the conclusion of the strike indicates that the petitioner did not discriminate against him because of such activities.

3. Discrimination for Giving Testimony.

The complaint filed against petitioner charged it with unfair labor practice in that it discriminated against two employees, namely, Thomas Liberatore and Paul Yarwood, for giving testimony under the Act on November 1 and 2, 1937. The Board in its decision dismissed the charge as to Liberatore, but did find that Yarwood was demoted on November 13 from the position of shipper to work of a common laborer, and thereafter was discharged on December 3 because of his membership and activity in the C. I. O. and because he gave testimony

under the Act. The Board found that Yarwood was given employment in his old position as a shipper when he returned to work on August 18; that thereafter on November 1 and 2 he testified in a hearing before the Board as a witness for the Union, and that thereafter he was demoted from his old position.

An examination of the record of Yarwood's pays, which began with July 15, will reveal that he worked in other positions than that of a shipper (Bd. Exh. 9(b), (g), (h), (i), (j), (k)). The Board finds that on November 13 he was discriminated against by being demoted from the position of shipper because he testified under the Act. The Board probably came to this conclusion from the records of pays ending November 30 and December 15. After November 13 the positions held by him were no different than those he held before that time. Yarwood himself testified that his work had been irregular and that he had worked in different positions during the entire period of his employment with petitioner (R. 230, 231). From this statement of Yarwood, it is apparent that the company did not treat him differently after the hearing of the case in which he testified than it did prior to that time.

Heretofore, in considering individual alleged discharges, we have discussed why Yarwood did not receive work after the election hearing until November 12 and was not employed after December 3. For this reason, reference is made to "Paul Yarwood" (page 31, *supra*).

4. Rights Guaranteed in Section 7.

In its concluding findings (R. 61, 62) the Board finds that petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act by shutting down its plan and collecting the badges of its employees, by dominating and interfering with the formation and administration of the Independent, by the activities of Matteo, Aubrey Sheehan,

and Gagany, by discriminating against union leaders and members after the strike, by the anti-union statements and conduct of P. J. Sheehan and Clingan, by the circulation of the petition against a Board election, and by its consistently contemptuous treatment of the C. I. O. and its leader.

All of these alleged grounds for interference have been discussed under various headings in the brief with the exception of the so-called lockout which was supposed to have taken place on June 15, 1937, the circulation of the petition in opposition to the Board's election, and the alleged contemptuous treatment of the C. I. O. and its officers. So that the Court may have a complete picture on these items and be better able to appreciate petitioner's contention that it has not in anywise interfered with the rights guaranteed to its employees under Section 7 of the Act, we present the following summaries.

We have stated that petitioner's plan was closed from June 5, 1937 to June 28, 1937. It was during this period and immediately prior thereto that the so called "little steel strike" was in progress in the Mahoning Valley. This strike closed the plants of some of the company's principal customers and sales of its products decreased to such an extent that it became apparent about the first of June that it would be necessary to close the plant for an indefinite time (R. 545 to 548, 602 to 605). The plant did close on June 5. A large number of employees were from Kentucky (R. 345), and it appearing that the shut down would last for an extended time, they began asking for advances on their pay in order that they might return to their homes. It was decided by the management that inasmuch as the plant was closed for an indefinite period, it would assist the men to give them their pay prior to the regular pay period.

Prior to this time, the company had adopted the use of identification badges to facilitate paying the men.

Numerous complaints had been made regarding these badges, particularly since each employee had been charged for his badge. Due to this fact and the fact that it was expected that some of the men might not return from Kentucky when the plant resumed operations, it was thought advisable by the paymaster to collect these badges at the time the men received their pay, and to refund their deposit. This resulted in paying the men on June 15, a week prior to their regular pay day, and taking up their badges.

By reason of the collecting of the badges and the advancing of pay day, some of the men believed that they had been discharged. However, when inquiries were made of the management, the men were told that they had not been discharged and they were informed the reason for the advance in time of the regular pay day and the reason for the collection of the badges. As evidence of its good faith and to further assure the men, the company signed a statement to the effect that as soon as the plant reopened the men could go back to work on the jobs they had prior to the closing (R. 873. Bd. Exh. 2).

In the face of these undisputed facts, and especially in view of the company's signed statement assuring the men of their jobs when the plant reopened, the Board's finding that the shut down and the collection of the badges was for the purpose of intimidating the men and discouraging membership in a labor organization, is based on suspicion, pure and unadulterated, and not upon reason.

The finding of the Board that the company was responsible for the circulation of the petitions opposing the C. I. O. petition for certification (Intervenors Exh. 4, R. 939, 940, 941, 942, 943) is another instance in which the Board has attempted to hold the company liable for acts of certain of its employees solely by reason of their relationship to Mr. Sheehan, general manager of the plant. It is admitted that this relationship might give rise to a sus-

picion that some of the activities of such employees might emanate from the management, but it would be a suspicion only, and in the absence of further proof of affirmative action or participation by those in authority, a finding based on such suspicion would not meet that degree of proof which the Act demands. Such proof of participation by anyone in authority is absent from the record.

When the circulation of these petitions is viewed from the background of the labor history of Petitioner's employees, with the hostility existing between the officers and leaders of the C. I. O. and the leaders of the Independent, with the dissatisfaction of the employees over the recent strike and their desire for freedom from labor disputes and turmoil, as evidenced by the petition signed by 160 employees expressing the desire not to have any kind of an election, C. I. O. or otherwise, it is clear that the circulation of the petition was the spontaneous action of an aroused majority of the employees and not the act of the company.

With respect to the finding of the Board that the company's consistent contemptuous treatment of the C. I. O. and its officers coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, the record discloses that on all occasions the company treated the union members with consideration and respect and any incident which might tend to show the contrary was caused by some official of the union. There is only one incident in the record which might be construed as being contemptuous and that was the accusation of Yarwood and Whitt that Mr. Clingan called them "rats and nuisances to the company." When Mr. Clingan learned that his remarks had been misconstrued by these two men, he immediately did everything in his power to correct this impression. He discussed this with them and was positive that he had convinced them that his remarks were not directed toward them (R. 292, 557). By way of explanation of this

incident, a few days prior thereto C. I. O. leaders, other than the company's employees, using loud speakers made speeches near the plant, at which time certain members of the management were referred to as "rats and scabs" (R. 227, 291) and these remarks of Mr. Clingan had reference to the remarks of these speakers rather than to Yarwood and Whitt (R. 556, 557).

In this connection the record as a whole shows that a very friendly relationship existed between the men and the management since we find the Board's witnesses referring to Mr. Sheehan, the general manager, as "Pat" and "P. J." and to Mr. Clingan, vice-president, as "Johnny." Alfred Whitt, one of the complainants and one of the men who had misunderstood Mr. Clingan, testified that he did not think that Mr. Sheehan was a man who would discriminate against any employees by reason of union membership (R. 290). On the other hand, Mr. Clingan, Mr. Sheehan and the foremen referred to each of the employees by their given name.

Petitioner is an old established firm having operated a brick making plant for 65 or 70 years (R. 117) and during that long period of time there have been only two occasions on which labor difficulties have arisen in the plant. The first was during the general steel strike of the year 1919 (R. 666, 667) and the second was during the little steel strike of 1937. On both occasions the difficulty in the plant arose from outside sources and not from difficulty within the plant itself. In both instances representatives from the steel plants caused the labor difficulties. In the instant case there was no complaint against the company by its employees because of inadequate wages, long hours or poor working conditions. The employees in this particular plant were paid higher wages than employees in any other brick plant in the United States (R. 217, 218, 286, 610). These conditions resulted in a contented spirit and a satisfactory relationship between the employees and their

employer and from the evidence adduced by the Board's witnesses that this condition existed until the time of the appearance of Mr. Payne, an outside C. I. O. organizer connected with the Republic Steel strike (R. 312, 313), who was not an employee of the company.

CONCLUSION.

The record as a whole discloses that the findings, conclusions, and orders of the Board against the petitioner and in favor of individuals and union organizations are substantiated by nothing but pure conjecture, and this type and degree of proof is grossly inadequate to substantiate the charges of the Board by that measure of proof required under the law, especially in the light of positive denials by the respondent of the charges against it. *Consolidated Edison Co. vs. N. L. R. B.*, 305 U. S. 197; 83 L. Ed. 126.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the judgment of the Circuit Court of Appeals for the Sixth Circuit may be reversed and the rights, privileges and immunities, claimed by petitioner under the Constitution and laws of the United States, may be protected, and to such an end a Writ of Certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit and finally reverse it.

Respectfully submitted,

PAUL Z. HODGE,
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Attorneys for The Niles Fire Brick Company.

APPENDIX.**STATUTES INVOLVED.****National Labor Relations Act:**

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, Secs. 701-712) as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection

(c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of

the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, Secs. 346 and 347).

**RULES AND REGULATIONS OF
THE NATIONAL LABOR RELATIONS BOARD.**

Series 1, As Amended.

Article II:

SEC. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; or

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 998

THE NILES FIRE BRICK COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court below (R. 948-956) is reported in 124 F. (2d) 366. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 36-114) are reported in 18 N. L. R. B. 883.

JURISDICTION

The order of the court below (R. 947) was entered on December 5, 1941. The petition for a writ

of certiorari was filed on March 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

After hearing but before determination of a representation proceeding under Section 9 of the Act, the Board instituted an unfair labor practice proceeding under Section 10 and consolidated the two proceedings, in both of which petitioner was a party and participated. The record in the representation proceeding was made a part of the record in the consolidated case and in its decision holding that petitioner had engaged in unfair labor practices the Board based its jurisdictional findings upon stipulated and other evidence which had been adduced at the hearing in the representation proceeding. There was no allegation or showing that this evidence was inaccurate. The questions are:

1. Whether in the circumstances the Board erred in consolidating the proceedings and in using the jurisdictional evidence adduced in the representation proceeding as evidence in the unfair labor practice proceeding, and if so whether the error was prejudicial.

2. Whether the Board's findings of unfair labor practices are supported by substantial evidence.

A question urged in the petition but upon which no provision of the Board's order is dependent in view of petitioner's other unfair labor practices is whether petitioner is responsible for the anti-union statements and conduct of one of its foremen.

STATUTE AND RULES INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set out in the Appendix, *infra*, pp. 17-20.

STATEMENT

Upon a petition filed by United Brick Workers' L. I. U. No. 198 (a labor organization affiliated with the C. I. O. and herein called the Union) requesting an investigation and certification of representatives, the Board on October 4, 1937, pursuant to Section 9 (c) of the Act, ordered an investigation (R. 36-37). Notice of hearing was served by the Board upon petitioner and other interested parties, and a hearing was held before a trial examiner of the Board on November 1 and 2, 1937. Petitioner appeared, was represented by counsel, and participated in the hearing with full opportunity to examine and cross-examine witnesses and to introduce other evidence bearing on the issues (R. 37, 115-141). During the hearing petitioner stipulated (R. 116-117) and its vice president testified (R. 120-141) as to facts pertinent to the question of the Board's jurisdiction (R. 118-119).

After the close of the hearing but prior to any decision in the representation proceeding, the Union on November 15, 1937, filed charges that petitioner had committed various unfair labor practices (R. 13, 37-38). On January 14, 1938, the Board, pursuant to Article II, Section 37 (b), of its Rules and Regulations (*infra*, p. 19), ordered that the representation proceeding and the unfair labor practice proceeding be consolidated for all purposes (R. 14, 38).

Thereafter the Board issued a complaint against petitioner alleging the commission of various unfair labor practices (R. 23-29, 38). A hearing thereon was held before a trial examiner of the Board from March 10 through 17, 1938 (R. 39, 142). Petitioner's objections to the order of consolidation (R. 142-143) were overruled by the trial examiner (R. 144) and his ruling was thereafter affirmed by the Board (R. 39). The record in the representation case was introduced by the Board over petitioner's objection and made part of the record in the consolidated case (R. 146-147). The trial examiner denied leave to petitioner to introduce jurisdictional evidence, which counsel for petitioner stated was in amplification and not in contradiction of that introduced in the representation proceeding (R. 540-543). However, the examiner allowed petitioner to make an offer of proof (R. 543-544) and in its decision the Board accepted as true the matters set forth in the offer (R. 40).

The examiner also granted petitioner's request for permission to make an additional offer of proof on the question of jurisdiction later in the hearing (R. 544). Petitioner did not avail itself of this opportunity.

On December 28, 1939, the Board issued its findings of fact, conclusions of law, and order (R. 42-114). The Board found that 60 percent of petitioner's annual purchases of raw materials costing \$275,000 and 10 percent of its sales of finished products which total \$600,000 are shipped in interstate commerce (R. 42-43, 106, 110; R. 116-117).¹ Petitioner does not dispute the sufficiency of the evidence adduced in the representation proceeding to support these findings, if the evidence properly was incorporated in the record used by the Board.

With respect to the unfair labor practices, the facts as found by the Board and shown by the evidence may be summarized as follows:

Soon after a C. I. O. affiliate began to organize petitioner's employees in the spring of 1937, petitioner shut down its plant and, in order to cause the employees to believe that they were discharged because of their union activities, took the unprecedented action of paying them off in advance and taking their identification badges (R. 43-44, 45; 152-153, 304-305, 345, 873). Within a few

¹ The references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

days, however, after a C. I. O. committee protested this action, operations were resumed (R. 44-45; 153-154, 305, 873).

A few weeks later a negotiating committee of the Union, accompanied by a Union organizer, called on General Manager Sheehan and presented a draft of a proposed contract (R. 45-46; 203, 306). Sheehan advised one of the committee members that the committee should return without the organizer, stating that Vice President Clingan "[didn't] want to see" him (R. 46; 203). Thereafter, Clingan informed the committee members that he would not talk to any "C. I. O. organizer" (R. 46; 307) and exhorted them to "forget the C. I. O." and form "some kind of a union here with no outside connections. I will consider going along with that" (R. 46; 203, 307). When the Union later made two further attempts to bargain with petitioner, Sheehan refused to discuss the Union's proposed contract and advised the committee that petitioner would not sign the contract despite the Union's offer to eliminate any provisions objectionable to petitioner or even to let petitioner "write up [its] own contract" (R. 47; 610-612, 307-308). During this same period, petitioner's labor foreman Gagany, told the Union's president that petitioner "will go along with you better" if "you form a company union, an independent union" (R. 47; 309, 350). The evening of its final meeting with petitioner, the Union went on strike; a substantial factor in causing the strike

was petitioner's foregoing display of hostility toward the Union and encouragement of an inside union, acts which the Board found to be in violation of Section 8 (1) of the Act (R. 47-48, 65; 156-157, 308-309).

During the strike, a son-in-law of General Manager Sheehan, James Matteo (R. 48, 54; 168), because he was aware of petitioner's desire to negotiate with an inside union (R. 54-55, 57; 794-795, 796-797), with Tackett, another employee, commenced to solicit the striking employees, including the Union's president, to form such an organization and return to work (R. 48-49; 201, 311, 862). Vice-President Clingan then personally assured Matteo that he would deal with an inside union (R. 49; 792-793). When Matteo and some Union committeemen proposed, however, that petitioner enter into a contract with an inside union containing a reservation that the contract could be turned over to the Union at any time, the proposal was rejected (R. 49; 169-170). And although petitioner met with Matteo several times, it refused to confer with officials of the Union (R. 49; 171-172, 313).

When the strike was ended by the Union on August 1, 1937 (R. 49; 157), petitioner refused to reinstate some Union members (R. 49; 172, 313). General Manager Sheehan declined to discuss their reinstatement with a Union committee, stating that

he would talk to each man only "as an individual" (R. 49-50; 172-173, 354-355, 370).² A conciliator of the United States Department of Labor was called in by the Union and several conferences were held with petitioner (R. 50; 161-166, 189, 313-315), one of which broke up when Vice-President Clingan referred to some of the Union committee members as "rats and nuisances to the Company" (R. 50; 166). The negotiations concluded with the rehiring of a group of Union men on August 18 and some others on September 1 (R. 50; 164-165, 236, 317, 390).

After the termination of the strike, Matteo and Tackett printed blank membership cards and solicited for an unaffiliated union, Brick Workers' Independent Organization, herein called the Independent (R. 51; 793-794, 857-858). Clingan assured them, once more, that he "would deal" with the Independent (R. 51; 794-795). Thereafter Matteo and Tackett, together with another son-in-law of General Manager Sheehan, James McCormick (R. 52; 188), circulated a petition opposing an election sought by the Union in the Board representation proceeding then pending (R. 51-52; 188, 267-268, 460, 504-505, 795, 814-815, 939-943). Following the Board hearing therein in November

² Later Sheehan likewise stated to a Union committeeman, "You know you can't get anywhere by coming in here as a group. If you talk for yourself, you will get somewhere" (R. 50-51; 358-359).

1937, various employees including Matteo, Labor Foreman Gagany, and Aubrey Sheehan, who was a supervisory employee and the son of General Manager Sheehan, extensively solicited for the Independent in the plant during working hours, in some cases threatening loss of employment for failure to join (R. 52, 56-60; 237-238, 250-251, 268-269, 349-350, 360, 422-423, 432, 454-455, 485, 835, 849, 852-853).³

Petitioner thereafter lent further aid to the Independent by discontinuing operations a half hour early to permit attendance at its organization meeting (R. 52; 486-489); when a second Independent meeting was held, Foreman Gagany instructed men then working under him to attend, without loss of pay (R. 53; 239-240). In contrast, petitioner during this period discriminatorily discharged various leaders and members of the Union (R. 61; *infra*, pp. 10-12). The Independent collected no dues (R. 53; 483, 485, 823) and made no effort to bargain with petitioner (R. 53; 826).

³ The Board found that petitioner was responsible for the activities of Gagany, Matteo, and Aubrey Sheehan (R. 54-61) because they were inspired by and emulated the example of Vice-President Clingan and General Manager Sheehan in opposing the Union and favoring an inside organization; because the two men related to the General Manager were permitted to use their relationship to coerce employees; because Gagany, as Labor Foreman, was admittedly a supervisor in charge of a department (R. 60; 591-592); and because Aubrey Sheehan was also a supervisor with authority to recommend discharge (R. 60; 852-853).

The Board concluded that petitioner, by various of its actions above set forth, interfered with its employees' rights of self-organization in violation of Section 8 (1) of the Act, and that it dominated, interfered with, and supported the Independent in violation of Section 8 (1) and (2) of the Act (R. 61-62, 109-110).

The Board found further that petitioner discriminatorily delayed reinstating 13 employees after the strike (R. 68, 71, 72, 75, 78, 81, 83, 84, 87, 89, 91, 93, 94); that it thereafter discriminatorily demoted one of these employees (R. 70) and discriminated against two others in distributing work (R. 76, 81); and, finally, that it discriminatorily discharged nine employees (R. 70, 71, 73, 76, 79, 81, 83, 94, 96), including seven who had suffered previous discrimination (*supra*). All of the employees were members of the Union and had participated in the strike;⁴ five of them were either Union officials or committeemen.⁵ Many of those selected for discrimination had been singled out for abuse or had been threatened with discrimi-

⁴ Yarwood (R. 66; 150, 157). Bacos (R. 70; 458). Nacco (R. 71; 253). Evans (R. 73; 491). Miller (R. 76; 430). J. Villio (R. 79; 266). Estes (R. 81; 389). Toth (R. 83; 235). Whitt (R. 85; 273). Liberatore (R. 88; 302). Mathews (R. 90; 440). A. Villio (R. 92; 369-370). Sabo (R. 93; 353). Nardo (R. 94; 466). Infante (R. 94; 419).

⁵ Yarwood (R. 66; 151, 315). Whitt (R. 85; 273, 315). Liberatore (R. 88; 302). A. Villio (R. 92; 315, 370). Sabo (R. 93; 315, 354).

nation because of their Union activities;⁶ or had refused to join the Independent or to sign the petition opposing the election;⁷ or had testified for the Union or had refused to agree not to testify.⁸

Although petitioner offered various explanations for its conduct, the Board found that the proffered reasons were either groundless or were not actually the motivating cause. Thus, the Board found, contrary to petitioner's claims, that certain of the employees had applied for reinstatement;⁹ that some of the employees were refused reinstatement, discharged, or otherwise discriminated against, in violation of petitioner's established seniority practice;¹⁰ that the alleged

⁶ Yarwood (R. 68, 69; 165-166). Evans (R. 73, 74; 494, 505). Miller (R. 76; 429-430). J. Villio (R. 80; 268, 269). Whitt (R. 86; 165-166). Sabo (R. 93-94; 359). Infante (R. 96; 454-455).

⁷ Evans (R. 74; 504-505). Miller (R. 76; 432). J. Villio (R. 80; 268-269). Nardo (R. 94; 466-467). Infante (R. 95; 423).

⁸ Yarwood (R. 66, 69; 185). Evans (R. 74; 502).

⁹ Yarwood (R. 67-68; 229). Bacos (R. 70; 458-459). Evans (R. 75; 491-492). Miller (R. 77; 436-437). Sabo (R. 93; 354-355).

¹⁰ R. 65; 642, 690, 711, 772. Yarwood (R. 68, 69-70; Bd. Exh. 3). Bacos (R. 71; Bd. Exh. 3). Nacco (R. 72-73; Bd. Exh. 3). Evans (R. 75; Bd. Exh. 3). Miller (R. 79; Bd. Exh. 3). J. Villio (R. 80-81; Bd. Exh. 3). Estes (R. 83; Bd. Exh. 3). Whitt (R. 86; Bd. Exh. 3). Mathews (R. 91; 442, 451-452, Bd. Exh. 3). A. Villio (R. 92; 378-379). Nardo (R. 94; Bd. Exh. 3). Infante (R. 95-96; 425-427, Bd. Exh. 3). Board Exhibit 3 is not printed, but is on file in the Court.

incompetency or disability of some employees was not the reason for the discrimination against them;¹¹ that petitioner offered conflicting or shifting reasons for its discrimination;¹² and that petitioner accorded unequal treatment to Union and non-union employees in the same position.¹³

The Board found and concluded that petitioner discriminated against these employees because of their Union membership and activities, in violation of Section 8 (1) and (3) of the Act (R. 104, 109-110, 114). Petitioner's discriminatory demotion and subsequent discharge of Yarwood were found to have been motivated by the additional reason that he had testified in behalf of the Union, hence to have been in violation of Section 8 (4) also (R. 66-70, 104, 110; 185).

The Board's order required petitioner to cease and desist from its unfair labor practices, to disestablish the Independent, to reinstate and make whole the nine employees discriminatorily discharged, to make whole the six other employees discriminated against, and to post appropriate notices (R. 111-114). The Board dismissed the complaint insofar as it alleged certain other unfair labor practices (R. 113-114). It dismissed without

¹¹ Yarwood (R. 68-69; 173, 685-686, 695). Evans (R. 75; 495-496). Miller (R. 77-78; 428). Liberatore (R. 89; 645-646, 316).

¹² Bacos (R. 70-71; 654, 754). Estes (R. 82; 392, 403-404). Toth (R. 84; 236, 403-404).

¹³ Estes (R. 81-82; 403-404, 678). Toth (R. 84; 403-404, 678).

prejudice the Union's petition for an investigation and certification of representatives (R. 114).

On January 6, 1941, the Board filed in the court below a petition for enforcement (R. 1-8), and on December 5, 1941, the court handed down its opinion (R. 948-956) and entered its order (R. 947) affirming the order of the Board.

ARGUMENT

The decision of the court below is correct. No conflict or other reason for further review of the Board's order is presented.

1. Petitioner contends (Pet. 15-23) that the consolidation of the unfair labor practice proceeding with the representation proceeding was unauthorized under the Act and together with the Board's reliance upon the jurisdictional evidence adduced in the latter proceeding constituted prejudicial error and a denial of due process of law. The trial examiner's exclusion of further evidence on the question of jurisdiction is assailed on similar grounds.

The consolidation was within the express terms of Article II, Section 37 (b) of the Board's rules and regulations (Appendix, *infra*, p. 19), which provided that at any time after the filing of a charge of unfair labor practices the Board, if it deemed it necessary to effectuate the purposes of the Act, might order that "such charge, and any proceeding which may have been instituted in respect thereto * * * be consolidated for the

purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region.”¹⁴ This provision is plainly valid under the rule-making power granted to the Board by Section 6 (a) of the Act (Appendix, *infra*, p. 17). See *Warehousemen's Union, etc. v. National Labor Relations Board*, 121 F. (2d) 84, 94 (App. D. C.), certiorari denied October 27, 1941, Nos. 627, 628, this Term. Cf. *Boske v. Comingore*, 177 U. S. 459, 470. The argument that Section 9 (c) of the Act in providing that a hearing in a representation proceeding may be held in conjunction with an unfair labor practice proceeding excludes power in the board to consolidate the proceedings once there has been a hearing in the representation case is without basis in the terms of the statute or in the legislative history and is intrinsically unreasonable. Cf. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 122. The Act is not to be construed narrowly to deny to the Board, or to the courts, familiar procedural powers not specifically granted by Congress but appropriate to orderly administration and not intended to be withheld. Cf. *Ford Motor Company v. National Labor Relations Board*, 305 U. S. 364; *Goldsmith v. Board of Tax Appeals*, *supra*.

Since the additional evidence which petitioner sought to adduce on the question of jurisdiction was conceded to be in amplification and not in

¹⁴ Both proceedings in this case were instituted at Cleveland, Ohio, in the Eighth Region of the Board (R. 36, 37).

contradiction of the evidence introduced in the representation proceeding and since the trial examiner admitted and the Board credited the only offer of proof made by petitioner (*supra*, pp. 4-5), the examiner's ruling excluding the evidence, if at all erroneous, was in no way prejudicial.

2. Petitioner urges (Pet. 23-24) that the Board erred in holding it responsible for the anti-Union and pro-Independent statements and other conduct of Foreman Gagany. The court below apparently sustained the Board on this issue (R. 954-955). The validity of the order, however, was not dependent upon such a holding since the evidence summarized in the Statement (*supra*, pp. 5-12) establishes that, entirely apart from the statements and acts of Gagany, petitioner violated Section 8 (1) and (2) of the Act.

In any event, petitioner's contention is without merit. Gagany was a foreman in charge of a department (R. 60; 591-592) and thus occupied a supervisory status sufficient under the decisions of this Court to charge petitioner for his anti-union activities whether or not they were authorized, especially since his conduct was in accord with the example set by petitioner's highest officials. *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 80-81; *H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 518-521; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 598-599. The cir-

cuit courts of appeals decisions asserted (Pet. 10) to be in conflict with that of the court below necessarily depended upon the particular facts presented and in none of the cases did it appear that the supervisor's anti-union conduct emulated the example of the employer's highest ranking officials.

3. Finally, petitioner contends (Pet. 24-57) that there is no substantial evidence to support the Board's findings of unfair labor practices. The evidence analyzed in the Board's decision and hereinbefore summarized (*supra*, pp. 5-12), is, however, clearly substantial. The court below reviewed the evidence in its opinion and there is no occasion for this Court to consider it further.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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National Labor Relations Board.

MARCH 1942.

APPENDIX

The following is a list of the names of the persons who

have been elected to the office of Mayor of the City of

San Francisco, California, from 1850 to 1899.

1850. James W. Wadsworth.

1851. James W. Wadsworth.

1852. James W. Wadsworth.

1853. James W. Wadsworth.

1854. James W. Wadsworth.

1855. James W. Wadsworth.

1856. James W. Wadsworth.

1857. James W. Wadsworth.

1858. James W. Wadsworth.

1859. James W. Wadsworth.

1860. James W. Wadsworth.

1861. James W. Wadsworth.

1862. James W. Wadsworth.

1863. James W. Wadsworth.

1864. James W. Wadsworth.

1865. James W. Wadsworth.

1866. James W. Wadsworth.

1867. James W. Wadsworth.

1868. James W. Wadsworth.

1869. James W. Wadsworth.

1870. James W. Wadsworth.

1871. James W. Wadsworth.

1872. James W. Wadsworth.

1873. James W. Wadsworth.

1874. James W. Wadsworth.

1875. James W. Wadsworth.



APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

SEC. 9. * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The pertinent provisions of National Labor Relations Board Rules and Regulations, Series 1, As Amended (April 27, 1936), are as follows:

ARTICLE II

PROCEDURE UNDER SECTION 10 OF THE ACT
FOR THE PREVENTION OF UNFAIR LABOR
PRACTICES

* * * * *

SEC. 37. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may permit a charge to be filed with it, in Washington, D. C., or may, at any time after a charge has been filed with a Regional Director pursuant to Section 2 of this Article, order that such charge, and any proceeding which may have been instituted in respect thereto—

* * * * *

(b) be consolidated for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same region; * * *

* * * * *

ARTICLE III

PROCEDURE UNDER SECTION 9 (c) OF THE ACT
FOR THE INVESTIGATION AND CERTIFICATION
OF REPRESENTATIVES

* * * * *

SEC. 3. If it appears to the Board that an investigation should be instituted it shall so direct and (except as provided in Section 10 of this Article) shall authorize the Regional Director to undertake such investigation, and to provide for an appropriate hearing upon due notice, either in conjunction with a proceeding instituted pursuant to Section 5 of Article II of these Rules and Regulations, or otherwise. The Regional Director shall thereupon proceed with such

investigation and in connection therewith shall prepare and cause to be served upon the petitioner, upon the employer or employers involved, and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation (all of whom are hereinafter referred to as "the parties to the proceeding"), a notice of hearing upon the question of representation before a Trial Examiner at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing.

* * * * *

SEC. 10. Whenever the Board deems it necessary in order to effectuate the purposes of the Act, it may—

* * * * *

(c) at any time after a petition has been filed with a Regional Director pursuant to Section 1 of this Article, order that such petition, and any proceeding which may have been instituted in respect thereto—

* * * * *

(2) be consolidated, for the purpose of hearing, or for any other purpose, with any other proceeding which may have been instituted in the same Region; * * *

End

